IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

CIVIL ACTION NO. 5396

JOSEPH POMPROWITZ, A SOLE TRADER, DOING BUSINESS AS L. C. L. TRANSIT COMPANY, PLAINTIFF; GEORGE A. HORMEL & COMPANY AND OSCAR MAYER & COMPANY, INTERVENERS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

This is a direct appeal, pursuant to 28 U.S.C. 1253, from a final judgment entered on March 17, 1954, by a specially constituted three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought by appellant motor carrier (Joseph Pomprowitz) to set aside an order of the Interstate Commerce Commission.[1]

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[1] Intervener-appellants (George A. Hormel & Company and Oscar Mayer & Company) are customers of Pomprowitz.

Appeal was allowed on May 13, 1954, and appeal papers were served on May 14, 1954.

Appellant motor carrier applied to the Commission for a determination that the words "manufactured or prepared foods," as used in a permit issued to him under the "grandfather" provisions of the Interstate Commerce Act, included the right to carry fresh meats, packing-house products, and materials and supplies used by meat-packing houses. The carrier also requested that, in the event the Commission should determine that the outstanding "grandfather" permit did not authorize such operations, a new permit be issued to cover them.

The Commission, after full hearing, denied the application, determining (a) that the "grandfather" permit did not authorize the carriage of fresh meats and packing-house products and (b) that the carrier had failed to establish that there was a need warranting the proposed new authorization. The district court, in a careful opinion, sustained the Commission's order.[2]

1. The Commission's interpretation of language which it has incorporated in a certificate or permit is controlling, unless clearly unreasonable. *Adirondack Transit Lines* v. *United States,* 59 F. Supp. 503, 504 (S.D.N.Y.) affirmed, 324 U.S. 824; *Dart Transit Co.* v. *United States,* 110 F.

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[2] Both the Commission's opinion (51 M.C.C. 343) and the opinion of the district court are appended to the statement as to jurisdiction.

Supp. 876, 880 (D. Minn.), affirmed, 345 U.S. 980; *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817 (C.A. 9), certiorari denied, 342 U.S. 830. As experience attests, generic descriptions of commodities, whether used in instruments of authorization or in carrier tariffs, have unavoidable ambiguities. Whether a particular commodity is covered cannot invariably, if indeed ordinarily, be determined by simple reference to the dictionary. Commission and trade usage, history and context necessarily play a frequent and important role in the process of interpretation. Examination of the facts and circumstances which bear on the meaning of the language used in appellant's permit makes clear that the Commission's interpretation here was an eminently reasonable one.

Appellant's permit was granted to him after protracted "grandfather" proceedings instituted by an application filed on February 3, 1936.[3] See See *Joseph Pomprowitz Contract Carrier Application, No. MC-31466*, 28 M.C.C. 241; 43 M.C.C. 821; 43 M.C.C. 822.[4] The permit ultimately issued

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[3] The "grandfather" provision relating to contract carriers by motor vehicle appears in section 209 (a) of the Interstate Commerce Act (49 U.S.C. 309 (a)). As this Court has stated, its purpose is to assure "substantial parity between future operations and prior [i.e., prior to Federal motor-carrier regulation] *bona fide* operations," *Noble* v. *United States*, 319 U. S. 88, 92.

[4] The opinions in 43 M.C.C., dated November 27, 1943, and June 29, 1944, are not fully reported.

provides in pertinent part that appellant may conduct contract-carrier operations for persons

> Who operate cheese and food processing businesses: of dairy products, dairy by-products, manufactured or prepared foods, and materials and supplies and equipment used or useful in the production thereof * * *.

The grant of this authority was predicated upon a finding that, during the "grandfather" period, appellant had transported, under contract with Kraft-Phenix Cheese Corporation, cheese, oleomargarine, mayonnaise products, salad dressing, sandwich spreads, and similar prepared food items. *Id.*, opinion of November 27, 1943, sheets 5-6. A list of Kraft-Phenix products is fully set forth in the opinion. *Ibid.* No meat or packing-house products are included.[5]

Moreover, the opinion of November 27, 1943, explicitly stated (sheet 12), "It should be observed that applicant's 'grandfather' application made no claim of rights to transport fresh meats and packing-house products * * *."

Even more conclusive is the fact that in 1942, while the "grandfather" proceedings were pending, appellant filed an application under section 209 (b) (49 U.S.C. 309 (b)) for new authority to carry, *inter alia*, such "merchandise as is dealt in by meat packing plants." This application was

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[5] The same is true of the list appearing in the Commission's opinion on reconsideration, dated June 29, 1944 (sheet 3).

denied in the very same opinions and orders which resulted in the issuance of appellant's "grandfather" permit.[6] The denial was based, not upon a conclusion that appellant already had such authority, but upon a specific finding to the effect that there was no need for the service for which authority was sought and that issuance of a permit would not be "consistent with the public interest and the national transportation policy." See opinion of November 27, 1943, sheet 13.

It thus appears that the opinions and orders issued in 1943 and 1944 expressly denied appellant what he now seeks by way of an interpretation. No appeal was taken from those decisions. Cf. *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 512-513.

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[6] The Commission stated in the opinion issued in the instant case (51 M.C.C. at 349):

> His permit was granted after protracted "grandfather" proceedings in which he specifically claimed the right to transport fresh meats and packing house products. In granting manufactured or prepared foods, the Commission, division 5, denied authority to transport fresh meats and packing house products; and in a companion application disposed of at the same time, No. MC-31466 (Sub-No. 2), it found that the requested authority to transport such commodities would not be consistent with the public interest or the national transportation policy. See Pomprowitz Contract Carrier Application, 28 M.C.C. 241, 43 M.C.C. 821, and 43 M.C.C. 822.

Appellant's effort to secure authority to transport fresh meats and packing-house products was actually pressed, in the earlier proceedings, in connection with his 1942 application for new authority.

The facts not only refute the suggestion that the Commission's interpretation is arbitrary, but likewise demonstrate that appellant's contention that he was misled is entirely without foundation. In this latter connection, it is also relevant to point out that appellant since 1940, has purchased permits from other motor carriers which authorize him to carry meat and packing-house products in a large part of the area covered by appellant's "grandfather" permit. Tr., p. 16.

We submit that the record fully supports the conclusion that the words "manufactured and prepared foods," as used in appellant's "grandfather" permit, did not grant, and could not have been intended to confer, authority to carry fresh meats and packing-house products.[7]

2. No challenge is made as to the correctness of the Commission's finding that the evidence does not establish "a need for a grant of authority to engage in the described transportation." It is suggested, however (see question 5, statement as to jurisdiction), that the evidence adduced at the administrative hearing was directed primarily to the matter of interpretation of the existing permit, and that the district court erred in failing to

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[7] Apart from the history of the "grandfather" proceedings and the other relevant facts peculiar to this case, the Commission points out in its opinion that the term packing-house products "has long had a peculiar meaning of its own in the transportation industry." The opinion also notes that the term covers a large variety of commodities which are not edible and are certainly not encompassed by the language "manufactured and prepared foods."

remand the case to the Commission "to permit the taking of further testimony." As the district court stated, and as appellant implicitly concedes, there was "full opportunity" at the administrative hearing to introduce evidence in support of the request for additional authority. The burden of showing a need for service rests squarely on the party seeking authorization. Appellant's failure to sustain that burden is scarcely a ground for setting aside the order of the Commission.

CONCLUSION

The decision of the district court is clearly correct. The case presents no question of general or substantial importance. The judgment should be affirmed.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

MAY, 1954.

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No. 167

IN THE

Supreme Court of the United States

October Term, 1954

JOSEPH POSTSCRIPT, GEORGE A. HORMEL & COMPANY, and OSCAR MAYER & COMPANY, *Appellants*,

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the Eastern District of Wisconsin

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APPELLANTS' PETITION FOR RECONSIDERATION OF AFFIRMATION OF DECISION OF LOWER COURT

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Appellants, on the grounds following, petition for reconsideration of the October 14, 1954, per curiam affirmation of the decision below:

Highly significant proceedings having arisen since our reply to the Motion to Affirm

Subsequent to the submission of our brief in reply to the Motion to Affirm, significantly relevant proceedings have come before this Court, or will ultimately reach the Court during this term. Also subsequent to the submission of our reply to the Motion to Affirm, conflicting positions have been taken by the Interstate Commerce Commission in certain proceedings as compared with that taken by it

in this proceeding. Appellants, in this petition for reconsideration, beg leave to submit those new matters for the Court's consideration, in addition to some of the grounds heretofore presented.

In MC-C-1605, *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, decided unanimously by the whole Interstate Commerce Commission on July 13, 1954, (subsequent to the filing of our reply to the Motion to Affirm) the Commission had before it a complaint alleging that defendant motor carrier was hauling fresh and frozen meats and fresh and frozen dressed poultry[1] without a certificate from the Commission authorizing such haulage. The Commission in that case held that both fresh meats and dressed poultry were manufactured commodities, and issued a cease and desist order. That is directly contrary to the holding of the Commission in the present proceeding, wherein it held that fresh meats are not manufactured commodities.

In the *East Texas* case the Commission said:

> " . . . Nevertheless, we shall review it briefly and later we shall refer to other evidence designed to show that fresh and frozen meats which are the products of the slaughter of ordinary livestock are, in any event, manufactured products.
>
> "Cattle are raised on farms and ranches and generally are shipped alive by the growers to stockyards operated by, or in conjunction with, meat packing companies. The slaughtering process begins only after the animals reach the stockyards and consists of (1) holding the cattle in pens, including resting, watering, and feeding, (2) killing, including knocking shackling, hoisting, and bleeding, (3) skinning and cutting, (4) washing, (5) stamping, scaling, and grading, (6) hot clothing, and (7) chilling. In processing the animals for slaughter, various mechanical and other aids are

[1] New York dressed poultry is poultry with only the head and feathers removed. Eviscerated poultry has the head, feet, feathers and entrails removed; and the liver, heart and gizzard cleaned, wrapped and replaced in the carcass. The Commission held that both of them are manufactured commodities.

employed, such as pens, runways, pulleys and chains, overhead conveyors, electric saws, mechanical slides, water heaters, ribbon branders, and chilling systems entailing the use of brine tanks, pumps, and related gear. . . .

"The evidence also contains, in exhibit form, numerous booklets, manuals, pamphlets, and statistical studies published in 1929 and later by various Federal agencies, including the Executive Office of the President and U. S. Departments of Commerce and Labor, indicating that, for industrial classification purposes, the slaughter of livestock, meat packing, and the dressing of poultry are regarded as manufacturing activities. As examples, in a 1933 publication of the Bureau of the Census, U. S. Department of Commerce, entitled Foreign Commerce and Navigation of the United States, meats are classified as dutiable imports under the listing of 'Manufactured Foodstuffs'. Four manuals issued by the Bureau of the Budget, Executive Office of the President, in 1940, 1943, 1945, and 1946, variously entitled Standard Industrial Classification, Standard Industrial Classification Manual, or Standard Commodity Classification, all classify meat packing and poultry dressing as manufacturing industries, and the products thereof as manufactured foods. A 1950 publication of the U. S. Department of Commerce entitled *Schedule A* Statistical Classification of Imports into the United States lists fresh and frozen meats and dead, dressed, or undressed poultry as 'Meat Products'. 'Meat Products' is listed under the broader classification of 'Agricultural Manufactured Foodstuffs and Beverages'." (Sheets 6 and 7)

Those quotations from that new decision of the whole Commission should be compared with the contrary holding of the Commission here.

In the *East Texas* case petition for injunction was filed in the District Court for the Southern District of Texas, Houston Division. (No. 8396, *Frozen Food Express, et al.* v. *United States, et al.*) It will be heard by a three-judge Court this month. We understand that the parties are seeking expedition so that the proceeding will reach this Court during the present term.

In its petition for a writ of certiorari (filed subsequent to our reply to the Motion to Affirm, and denied October 14, 1954) in No. 264, this term, *Interstate Commerce Commission* v. *Kroblin*, the Commission said:

> " . . . If Congress had intended slaughtered farm animals to be exempt, it would not have stopped by exempting ordinary livestock but would have exempted the meat products thereof. Obviously, therefore, Congress did not intend to exempt the meat products of ordinary livestock. By the same token, if Congress did not intend to exempt slaughtered animals and meat products, it logically follows that it did not intend to exempt killed and dressed poultry. Surely Congress did not intend to give the poultry packers advantages which it had not given meat packers. . . .
>
> " . . . If the Court's interpretation as to dressed poultry stands, what is to prevent the extension of the exemption to embrace all meat products and bring the gigantic packing industry within the exemption, destroying the value of hundreds of certificates and permits as well as bringing chaos and instability to the packing industry? At least so far it has not been contended that a beef carcass or the meat products of slaughtered farm animals are within the exemption, or that they are agricultural commodities simply because the animals were raised on the farm. Yet cattle and hogs are products of the farm just as is poultry. The principal difference between the two is the size of the animals and perhaps the degree of processing occasioned by the size of the animals. . . ." (Page 19)

The position taken by the Commission in that new proceeding is contrary to the position it took in the present proceeding. And in that case the United States took no part.

In the present case the Commission stated that fresh meats "may become a manufactured or prepared food only after they have been converted from *their natural state* into a different form." (51 M.C.C. 343, 349) That undoubtedly

means that any edible meat product beyond the carcass stage is considered to be a manufactured or prepared food. That would include fresh sausage, any edible packing-house products, and the like. But we go further: In "their natural state" fresh meats are not fresh meats but live animals. Therefore, "fresh meats" themselves are manufactured foods. As stated by the Commission in its petition for a writ of certiorari in No. 264, *Interstate Commerce Commission* v. *Kroblin*, filed since our reply to the Motion to Affirm, the District Court for the Western District of Tennessee in *Interstate Commerce Commission* v. *Weldon*, 90 F. Supp. 873, 875, 876, in speaking of the transportation of raw shelled peanuts said that to be not manufactured products, they must be "in their natural state," i.e., unshelled. Here carcass meats are, in fact, further manufactured than shelled peanuts. See quotation in our reply to Motion to Affirm, page 12, from *Superior Packing Co.* v. *Clark*, 164 F. 2d 343, 349, holding that the live steer is in its natural state and the carcass, etc., is a manufactured product. See also quotations hereinbefore from the Commission's new decision in the *East Texas* case, describing the slaughtering process, and specifically stating that the products "are, in any event, manufactured products."

Restated, in those two new proceedings the Commission has taken a position contrary to the position it took in the present proceeding.

The law does not contemplate that whim may dictate when the Commission may say fresh meat is a manufactured product and when it may say it is not manufactured.

In this connection, observe that the Commission has on a number of prior occasions included meats when issuing permits to haul "foods." (Reply to Motion to Affirm, pp. 10-13)

The Commission has not "explained its departure from prior norms and has not . . . spelled out the legal basis of its decision." (*Secretary of Agriculture* v. *United States*, 347 U.S. 645, decided June 7, 1954)

Additional grounds which warrant denial of Motion

The Commission's jurisdiction to revise "orders" is different from its jurisdiction to revise permits. The Court below failed to recognize that difference. (Commission's decision quoted in our reply to Motion to Affirm, and cited with implied approval by this Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424; pages 10 to 16 and 19 to 22 of reply to Motion to Affirm)

A permit may be changed only on the conditions outlined in Section 212(a) of the Motor Carrier Act. The Commission and the lower Court permitted revision of the permit without either of those conditions being present. (Reply to Motion to Affirm, pp. 18-21)

The Commission or the Court may not go back of a permit to determine "intention" where there are no technical terms or ambiguity, as here. (Reply to Motion to Affirm, pp. 15-22)

This Court, in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, said that the Commission may not "atomize" too closely. In the discretion of the Commission it may use generic terms or it may use specific terms. Here it used generic terms. But when the Commission speaks in the permit, it is through speaking. The permit must speak for itself. It is the document to which the world and the Courts must look. It is not for the Government to hide behind any improprieties in the Commission's own action. (Reply to Motion to Affirm, p. 18)

The language in the permit includes fresh meat and packing-house products. Other decisions of the Commission so indicate. (Reply to Motion to Affirm, pp. 10-13)

The Commission lulled appellants into the belief that the permit granted the authority in question. (Juris-

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dictional Statement, p. 7; reply to Motion to Affirm, pp. 2-3)

The Commission stated that the principal question posed is whether "manufactured or prepared foods" embraces "packing-house products generally and fresh meats in particular." The Commission defined what it meant by "packing-house products *generally*" (a new term in the industry) when it said, in the next line, that "the term in question [manufactured or prepared foods] contemplates only those food items which are fit for human consumption, and necessarily excludes, therefore, the numerous packing-house products not so adapted." (Jurisdictional Statement, p. 22) One of the purposes of filing supplemental applications was to obtain authority to haul the inedible products. Nowhere have we contended that "manufactured or prepared foods" embraces inedible packing-house products.

Here, as in this Court's decision in *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (decided June 7, 1954),

> "the Commission has not explained its decision 'with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-511."

If we are to disregard the permit, as contemplated by the decisions of the Commission and the lower Court, and go back of the permit to the findings in the decisions leading up to the permit or even go back of them to the text of the decisions, to learn what was authorized, we run into hopeless confusion. We are at a loss to know which controls—(1) the permit, which, under the statute, is the

last word, (2) the findings in the decision, which is the next to last word, or (3) the text of the decision,* which is the first word, but which in many instances may be but a passing remark carrying no conclusion. The following tabulation illustrates that.

The bracketed number references and emphasis are ours. Commodity description as recited in the Permit [1] in question:

"And with persons (as defined in Section 203(a) of the Interstate Commerce Act) who operate [2] *cheese and* [3] *food processing businesses,* for the transportation of the commodities indicated and in the manner specified below:

"Dairy products, dairy by-products, [4] *manufactured* or prepared foods, and [5] *materials, supplies and equipment,* used or useful in the production thereof, and [6] *household goods* as defined in Practices of Motor Common Carriers of Household Goods, 17 M.C.C. 467."

	November 27, 1943[1]	August 4, 1938[2]
DECISIONS:		
TERRITORY:	"From to, and between points in Wisconsin, Minnesota, Iowa, Illinois, and Missouri." (Syllabus)	"From and to points in Indiana and Michigan, except in the northern part of the Lower Peninsula of Michigan." (Syllabus)
FINDINGS:	"[7] *who operate cheese and food processing businesses,* of dairy products, dairy by-products, [8] *manufactured* or prepared *foods,* and [9] *materials and supplies and equipment,* used or useful in the production thereof, and [6] *household goods.*" (Sheet 14 of mimeographed decision)	"dairy products, prepared foods, and [10] *other commodities requiring refrigeration or similar protective service.*" (9 M.C.C. 304)

* Not available either in the printed volumes of the Commission's decisions or in the Federal Register.

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COMMODITIES DESCRIBED IN TEXT OF DECISION:

November 27, 1943[1]	August 4, 1938[2]
"[11] *Cheese, oleomargarine,* mayonnaise products, salad dressings, *sandwich spreads,* confectioneries, *milk* and *cream,* dried milk products, *milk, butter,* horseradish, frozen cream, *eggs (fresh, frozen, or dried),* dried vegetables, *soup,* table sauce, flavoring compounds, *lard substitutes, dairy by-products,* raw materials, advertising supplies, and supplies used in the manufacture and distribution of the above-named commodities, factory equipment and office supplies." (Footnote 4, sheet 5, of mimeographed decision)	"Those written contracts embrace the transportation of cheese, cream, and *various dairy products* and also [12] *any other commodities offered for shipment by the Kraft companies.* Obviously, there are many commodities which the Kraft companies never offer for transportation. They are engaged primarily in the production and sale of dairy products and various food commodities, but they also use quite a number of different [13] *supplies,* such as sugar, spices, and other ingredients, and [13] *materials* used about their plants, [13] *display racks, containers,* and certain by-products, such as [14] *animal feeds.* The term 'dairy products and [15] supplies used in the manufacture and sale of cheese and prepared foods' embraces substantially all commodities they offer for transportation. Most of those *commodities require refrigeration and other protective service.*" (9 M.C.C. 302)

[1] *Joseph Pomprowitz Contract Carrier Application,* No. MC-31466, decided November 27, 1943, not printed.

[2] *Joseph Pomprowitz Extension—Indiana-Michigan,* 9 M.C.C. 301.

[1] The terms in the permit here considered are those in the finding in the 1943 decision, but do not resemble the finding in the 1938 decision, even though the permit embraces both.

[2] The permit requires that the contract must be with a "cheese or food processing business." The finding in the 1938 decision does not so require. Therefore, may any one in another business enter into a contract if he ships any of the commodities, notwithstanding the wording of the permit?

[3] The Commission says meat packers are engaged in the processing of foods, and the lower Court held that these meat packers are in the food processing business. Therefore, may not a contract be made with a meat packer?

[4] The term "manufactured" is used in the finding in the 1943 decision, but not in the finding in the 1938 decision. That term is used in the list of commodities in the text of the two decisions in connection with the use of supplies, etc., in the manufacture of various commodities.

[5] The expression "materials, supplies and equipment" in the permit appears in the finding in the 1943 decision, but not in the finding in the 1938 decision. In other words, there is no finding as to them in the 1938 decision even though the permit authorizes them to be hauled. May they be hauled from Indiana?

[6] The permit authorizes the hauling of "household goods." However, no mention of that commodity is made anywhere in the 1938 decision. May they be hauled from Indiana? In footnote 4, sheet 5, of the mimeographed 1943 decision, which purportedly sets forth the commodities hauled for Kraft, no mention is made of household goods. One must look elsewhere in the text of that decision for reference thereto.

[7] The Commission's finding in the 1943 decision confines operations to cheese and food processors, whereas the 1938 decision does not, even though the permit carries that restriction. May a contract be

made with one in Indiana who is not a food processor?

[8] The finding in the 1943 decision and the permit authorize "manufactured . . . foods" whereas the 1938 decision does not. May they move from Indiana?

[9] The finding in the 1943 decision and the permit authorize "materials and supplies and equipment" whereas the finding in the 1938 decision does not. May they move from Indiana?

[10] The finding in the 1938 decision includes, without restriction, "other commodities requiring refrigeration or similar protection," whereas neither the 1943 decision nor the permit authorize that. May "other commodities requiring refrigeration" be hauled from Indiana, or only from Indiana and not from other points? That finding would unquestionably include fresh meats and packing-house products, most of which require such protection.

[11] The Government in its Motion to Affirm said that "No meat or packing-house products are included" in the list in the Commission's opinion of 1943. (Page 3 of the Motion) Among the "manufactured or prepared foods" listed in the footnote in the 1943 decision which are shipped by meat packers are the following: Cheese, oleomargarine, sandwich spreads, milk and cream, milk, butter, eggs (fresh, frozen, or dried), soup, lard substitutes, and dairy by-products. These are specifically embraced by the lists set forth in the appendices of the decisions of the Commission in Ex Parte MC-38, *Modification of Permits—Packing House Products,* 46 M.C.C. 23, 48 M.C.C. 628, and Ex Parte MC-45, *Descriptions in Motor Carrier Certificates,* 61 M.C.C. 209, the latter rendered subsequent to the decision here under consideration. In the former decision, the Commission specifically stated that the objective was that carriers holding permits

"should be authorized to render a complete service in the special type of transportation in which they were engaged." (48 M.C.C. 628, 635) If only those specifically listed in that footnote may be hauled, why did the Commission not set them forth in the permit rather than use the additional term "manufactured or prepared foods"? In the 1938 decision the finding specifically includes "other commodities requiring refrigeration."

[12] The text of the 1938 decision speaks of "any other commodities offered for shipment by the Kraft companies." What the commodities might be next year, for example, no human being can anticipate. If Kraft went into the meat packing business could all of its commodities be hauled, but not for another meat packer? Yet, if we must go back of the permit, we assume that the authority covers Kraft. But observe that the Commission indicates that the motor carrier had contracts with about a dozen shippers other than Kraft, even including a meat packer. (Appendix A of 28 M.C.C. 241, 246) The statute specifically authorizes additional contracts with others. (Reply to Motion to Affirm, p. 8)

[13] The 1938 decision speaks in its text of "supplies . . . materials . . . display racks, containers," but the finding of the decision does not include them. However, the wording of the permit includes them. May they nevertheless be hauled from Indiana?

[14] The 1938 decision speaks in its text of "animal feeds." They are not embraced by the findings. May they be transported because within the terms of the permit as "dairy by-products"?

[15] In the text of the 1938 decision reference is made to "supplies." The findings make no mention of them, but the permit does. May they be hauled from Indiana?

Such confusion can not be avoided without relying entirely upon the terminology of the permit, as contemplated by the law.

Superimposed upon the indefiniteness with which we are confronted by thus going back of the permit, is the further indefiniteness of the Commission's own description of what products shipped by meat packers come within the term "manufactured or prepared foods." (Reply to Motion to Affirm, pp. 4-8)

The Commission and the United States in their Motion to Affirm referred to a statement in the 1943 decision that the motor carrier's "grandfather" application made no claim of rights to transport fresh meats and packing-house products. (Page 3 of Motion) It will be observed that the motor carrier's "grandfather" application was for authority to transport "general commodities" which would include fresh meats, packing-house products, etc. (28 M.C.C. 241; sheet 1 of the 1943 decision) While the commodities listed in the footnote on sheet 5 of the 1943 decision purport to be those shipped by Kraft, in the text on the same sheet under the subject "'Grandfather' Application" reference is made to testimony concerning the hauling of fresh meats and packing-house products. In the appendix to the prior report in that proceeding are listed the names of three meat packers as shippers being served, i.e., Plankinton Packing Company, Milwaukee, Wis., Swift & Company of Chicago, Ill., and St. Louis Independent Packing Company of St. Louis, Mo. (28 M.C.C. 241, 246) So, in connection with the "grandfather" application, in the 1943 decision itself reference is made to uncontradicted testimony relative to the very commodities here considered.

The Commission has been far from uniform in its interpretation of the terms here in question. The present interpretation is not of "long standing." In fact, it conflicts with both prior and even subsequent holdings. It is certainly not a decision arrived at after careful consideration. The holding is arbitrary and capricious.

May we submit the following excerpts from the recommended report of the Examiner who heard the proceeding:

". . . Because of his contention that he already has this authority, most of the testimony for applicant is not on the point of necessity for service. . . .

". . . While most of the traffic he handles is composed of foods, the variety is great. . . .

"Applicant has been ill for a long while. Since, on the record here, the recommendation must be to deny the application, the best solution would be to deny it on the general grounds that the proposed operations would not be consistent with the public interest or with the national transportation policy. This would leave applicant's organization free to re-study its regulatory situation and to take such further steps as they deem proper."

We petitioned for further hearing and reconsideration, but that petition was denied by the close vote of 6 to 5. (Reply to Motion to Affirm, pp. 23, 24)

Conclusion

Because of the substantial questions of vital public importance presented by this appeal—questions which have never been passed upon by this Court—appellants respectfully pray that the Court reconsider its decision of October 14, 1954, and that the motion to affirm be denied, and that the case proceed to a determination on its merits.

Respectfully submitted,

WARREN H. WAGNER,
Attorney for Appellants,

Certificate

The foregoing petition for reconsideration is believed to be meritorious and is presented in good faith and not for delay.

November 4, 1954.

WARREN H. WAGNER,
Attorney for Appellants.

Certificate of Service

I hereby certify that I have this date served copies of the attached Petition of Appellants for Reconsideration of Affirmation of Decision of Lower Court upon Simon E. Sobeloff, Esq., Solicitor General, Department of Justice, Washington, D. C., and Edward M. Reidy, Esq., General Counsel, Interstate Commerce Commission, Washington, D. C., by causing copies thereof to be mailed to them at their respective addresses.

WARREN H. WAGNER,
Attorney for Appellants.

Dated at Washington, D. C.
November 4, 1954.